Not Law (But Not Yet Effectively Not Law)

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Analysis

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The United Kingdom Supreme Court ("UKSC") had this to say about a provision of an Act of the Scottish Parliament:[1]

> The difference in treatment has no logical justification. It is unfair and disproportionate. It is no answer to this criticism to say that there was an urgent need to meet the problem that had been identified. The legislation was intended to have an effect which was permanent and irrevocable.

This is hardly a ringing endorsement of the exercise of the Parliament's devolved powers. In March 2012 the Court of Session had held that section 72 of the Agricultural Holdings (Scotland) Act 2003 violated Salvesen's rights under article 1of the first protocol to the European Convention on Human Rights ("A1P1").[2] Section 72 was, therefore, beyond the Parliament's legislative competence[3] and, as such, was "not law".[4] The Court of Session's interlocutor was not final,[5] nor did it issue one that was final and calibrated to provide a full remedial response to its finding, instead granting leave to appeal to the UKSC on 29 March 2012,[6] thus rendering further procedure in the Court of Session inappropriate. The Second Division's interlocutor, as it stood, declared the entirety of section 72 to be in violation of the Convention, and hence beyond the Parliament's competence.

This contextual background is important, for while the UKSC allowed the appeal it did so in a manner that left much of the substance of the Second Division's findings undisturbed – the UKSC only recalled the interlocutor in order to substitute

1 *Salvesen v Riddell* [2013] UKSC 22 at para 44 per Lord Hope of Craighead (with whom Lords Kerr, Wilson, Reed and Toulson agreed).
2 *Salvesen v Riddell* [2012] CSIH 26, 2012 SLT 633 at para 107 per the Lord Justice Clerk (Gill) (hereafter "*Salveson* (IH)").
3 Scotland Act 1998 s 29(2)(d). See also D J Carr, "Not law" (2012) 16 EdinLR 410; M M Combe, "Human rights, limited competence and limited partnerships: *Salvesen v Riddell*" 2012 SLT (News) 193.
4 Scotland Act 1998 s 29(1).
5 *Salvesen* (IH) at para 105.
6 *Salvesen* at para 30. Leave was required as the case concerns the competence of an Act of the Scottish Parliament, which is a devolution issue: Scotland Act 1998 Sch 6 paras 1(a) and 13(b).

the narrower finding that section 72(10) violated the Convention, and was therefore beyond the Parliament's competence.[7] Confirmation that the impugned provision was in violation of the Convention – and clearly so – is not surprising. However, the case provides the first guidance about what the courts will do when faced with an *ultra vires* Act of the Scottish Parliament.

A. MINISTERS AND PARLIAMENT

Ministerial conduct featured prominently in Lord Gill's opinion in the Second Division.[8] In his opinion, it was appropriate to consider statements of ministers to Parliament during the passage of the Agricultural Holdings (Scotland) Bill to assist in identifying the justification behind section 72.[9] Searching for such a justification was a component of the well-known proportionality test in relation to A1P1.[10]

Interference with a property right must be in the public interest, but national parliaments enjoy discretion in a question with national courts to determine what is in the public interest by virtue of the national courts' respect for their democratically derived primacy[11] (and not under the margin of appreciation, which is a component of the European Court of Human Rights' (ECtHR) supranational jurisdiction[12]). This much has been clear since *James v UK*[13] demonstrated that the jurisprudence of the ECtHR in this area is premised upon judicial deference to the national authorities' evaluation of political, economic and social issues.[14] Domestic courts have, despite not being bound to do so,[15] followed Strasbourg's lead and acknowledged the domestic decision maker's wide discretion.[16] The scope and importance of that discretion is underscored by its applicability both

7 *Salvesen* at para 58.

8 *Salvesen* (IH) at paras 87-96.

9 At para 87.

10 On proportionality generally, see Lord Reed's important recent (dissenting) opinion in *Bank Mellat v Her Majesty's Treasury No 2* [2013] UKSC 39 at paras 68-76; more generally, see A Barak, *Proportionality* (2012).

11 *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 at para 32 per Lord Hope and para 131 per Lord Reed.

12 *R v DPP ex parte Kebilene* [2000] 2 AC 326 at 380E-381D per Lord Hope; *Brown v Stott* 2001 SC (PC) 43 at 58I-59A per Lord Bingham.

13 *James v United Kingdom* (1986) 8 EHRR 123.

14 *Vistiņš and Perepjolkins*, App no 71243/01, 25 October 2012 at para 106.

15 Human Rights Act 1998 s 2(1)(a). See *Regina (Ullah) v Special Adjudicator* [2004] 2 AC 323, and the recent interpretations in *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 at paras 110-114 per Lord Brown; *Hamilton v Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486 at para 49 per the Lord President (Hamilton); *Achmant v Greece* [2012] EWHC 3470 (Admin) at paras 26-27 per Singh J; *Richards v Ghana* [2013] EWHC 1254 (Admin) at paras 50-52 per Leggatt J. The "*Ullah* principle", as developed by the UKSC, is followed by the Scottish courts: "It may be that the '*Ullah* doctrine' is ripe for reconsideration or reformulation but, given its repeated application in the Supreme Court, it is not for this court to attempt any such reconsideration or reformulation." *Ross v HM Advocate* [2012] HCJAC 45 at para 28 per the Lord Justice General (Hamilton).

16 *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122.

to the instrument adopted and any assessment of the proportionality of that instrument.[17]

Lord Gill's analysis of possible justifications, which might be contained within ministerial statements, concluded that section 72 was essentially "retaliatory" and "punitive".[18] Lord Hope was more cautious: "...one must be careful not to treat a ministerial or other statement as indicative of the objective intention of Parliament".[19] Moreover, the question of Convention compliance and the competence of section 72 was to be "judged primarily by what the section provides, not by what was said by the deputy minister".[20] Lord Hope's cautious approach must be technically correct, though one might argue that the Lord Justice Clerk's is more in tune with the realities of modern legislating. Indeed, there is some uncertainty about when it is appropriate to examine ministerial statements in order to ascertain the aims and objectives of legislation. In *Wilson v First County Trust Ltd*[21] Lord Hope noted that reference might be made to ministerial statements when seeking to ascertain whether the aim behind legislation was legitimate.[22] As Lord Hobhouse noted:[23]

> The questions of justification and proportionality involve a sociological assessment – an assessment of what are the needs of society. This in part involves a legal examination of the content and legal effect of the relevant provision. But it also involves consideration of what is the mischief, social evil, danger etc. which it is designed to deal with. Often these matters may already be within the knowledge of the court. But equally there will almost always be other evidentially valuable material which can be placed before the court which is relevant...To exclude such evidential material from the case merely because it is to be found in some statement made in Parliament is clearly wrong, particularly if ministerial statements made outside Parliament were already being relied on. This has nothing to do with investigating or questioning the will of Parliament. Parliament has spoken by passing the relevant Act. The evidence is admitted because it relates to making the required sociological assessment.

Lord Hobhouse's analysis is attractive in the sense that it recognises that the text of an enacted statute will always represent Parliament's will, but the objectives and motivations underpinning the exercise of that will are theoretically distinct. One could argue that Lord Gill's approach is consistent with this analysis, and indeed with Lord Hope's earlier speech in *Wilson*. Likewise, in *Axa*,[24] when examining whether the Damages (Asbestos-related Conditions) (Scotland) Act 2009 had been pursuing a legitimate aim, Lord Hope quoted liberally from ministerial statements, regulatory

17 *Hermann v Germany*, Application no. 9300/07, 26 June 2012 at para 74; *Depalle v France* (2012) 54 EHRR 17 at para 83; *Chassagnou v France* (2000) 29 EHRR 615 at para 75; *Fredin v Sweden* (1991) 13 EHRR 784 at para 51; *Allgemeine Gold-und Silberscheideanstalt v UK* (1987) 9 EHRR 1 at para 52.

18 *Salvesen* (IH) at para 90.

19 *Salvesen* at para 37, relying on *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at para 66 per Lord Nicholls.

20 *Salvesen* at para 39.

21 *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

22 *Wilson* at para 118.

23 At para 142; Lord Rodger expressly adopted Lord Hobhouse's analysis (para 178).

24 *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122.

assessments and explanatory notes to the Bill.[25] The fact that he acknowledged that ministerial statements were not "irrelevant" and could provide "important information" about the purpose of legislation arguably only obscures matters, coming as it does after exhortations to distinguish the Scottish ministers from the Scottish Parliament. Indeed, examination of the gestation and evolution of the discriminatory provisions in a vacuum, bereft of ministerial statements, comes to a similar conclusion but bears an air of artificiality. It may not be possible to adopt a rigid rule, and there are grounds in both authority and common sense for the two approaches.

B. SECTION 72 AND A1P1

The UKSC took a somewhat narrower approach to the compatibility of section 72 than that taken by the Second Division. The language used in Lord Gill's opinion suggests that the whole of section 72 was incompatible with Convention rights and the interlocutor of the court reflected this.[26] Given the fact that the Second Division had not yet heard submissions about the severability of components of legislation in such a situation, indeed the court specifically invited them for a future hearing,[27] this is unsurprising. The UKSC had the benefit of more specific submissions and identified the key provision to be section 72(10).[28] The significance of section 72(10) is that it acts as a gatekeeper provision: it determines whether or not landlords will be able to terminate a tenancy using section 73. The importance of section 73 is that it allows landlords to bring tenancies to an end by notice[29] without the necessary involvement of the Land Court, which is an attractive counterpoise to the security of tenure afforded to tenants in certain circumstances.[30]

The challenge to section 72(10) rested upon its gatekeeper effect in that it prevented landlords[31] who had given notice between 16 September 2002[32] and 30 June 2003[33] from availing themselves of the benefits of section 73 (landlords giving notice after 30 June 2003 could use section 73). Section 72(10) is, therefore, patently discriminatory and operates to penalise some landlords retrospectively.[34] The appellant's argument, that such discrimination constituted a proportionate and justified legislative response to avoidance on the part of the Scottish Parliament within its wide policy discretion under A1P1, was emphatically rejected,[35] as it had been in the Inner House.[36] The key was the absence of a rational explanation for

25 At paras 29-30.
26 *Salvesen* (IH) at para 107.
27 At para 105.
28 *Salvesen* at para 41.
29 Agricultural Holdings (Scotland) Act 2003 s 73(3).
30 Section 72(6).
31 Under a tenancy subsisting as a result of s 72(6).
32 In conjunction with Agricultural Holdings (Scotland) Act 2003 s 72(3)(a).
33 Section 72(10)(b)(i), and Agricultural Holdings (Relevant Date and Relevant Period) (Scotland) Order SSI 2003/294 at para 2.
34 *Salvesen* at para 42.
35 At para 44.
36 *Salvesen* (IH) at para 97.

the difference in treatment between those giving notice before and after 30 June 2003. Both courts held that this (unjustified) differential treatment was so clearly set out that section 72(10) could not be ameliorated by reading the impugned provision according to the appropriate interpretative canons set out in the Scotland Act 1998 and Human Rights Act 1998.[37] Section 72(10) could not be saved.

C. REMEDIAL ACTIONS

One of the most interesting elements of the decision is the question of remedies: what practical actions would the court take when confronted by a piece of legislation that was outwith the competence of the Scottish Parliament? Lord Hope situated his discussion of the various statutory remedies within a broader context of principle: although a problem had been found with the legislation, it remained a matter of policy, and therefore a question for the Parliament, to consider how to respond to the incompatibility.[38] Finding section 72(10) to be incompatible with A1P1 was exacerbated by its gatekeeper role: without it section 73 is a dead letter.[39] Taking the principle of deference to the democratic process alongside the potentially stark consequences of the incompatibility finding, the court restricted its finding to section 72(10) because "the finding of incompatibility ought not to extend any further than is necessary to deal with the facts of this case, and it is important that accrued rights which are not affected by the incompatibility should not be interfered with."[40]

The selection of a remedy must, therefore, be seen in the context of principle set out by Lord Hope that repair of the section is for the democratically elected Parliament. A court deciding that an Act of the Scottish Parliament is incompetent can remove or suspend the retrospective effect of the decision.[41] Any order varying the normal temporal effect of a decision must have "regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected."[42] The court considered that the effect of section 72(10) on landlords was such that it could not suspend the retrospective effect of the decision,[43] because to do so would constitute a breach of Convention rights by the court under section 6 of the Human Rights Act 1998.[44] At the same time the potential effects of the incompatibility on section 73 could cause substantial disruption to closed transactions and prejudice to tenants.[45] Lord Hope recognised that the intricate legislative repair work needed to remove the incompatibility would have to balance these concerns. The Parliamentary processes of consultation and debate, with the benefit of the Scottish government's assistance, were the appropriate

37 Para 49.
38 Para 51.
39 Para 50.
40 Para 51.
41 Scotland Act 1998 s 102(2)(a)–(b).
42 Section 102(3).
43 *Salvesen* at para 57.
44 Para 54. The court, of course, being a public authority for the purposes of the Human Rights Act 1998.
45 Para 55.

institutional mechanism to evaluate and address such difficulties. It was recognised that the necessary institutional response would take time, and this was something the court could give by suspending the effect of its decision that section 72(10) was not law for twelve months or such shorter period as required to address the incompatibility.[46]

D. CONCLUSION

The decision in *Salvesen* is the first time that the UKSC has decided that an Act of the Scottish Parliament contains provisions that are beyond the Parliament's competence. The substantive breach of A1P1 by section 72(10) is patent, and the language used by judges in both the Inner House and the UKSC reflects that fact. A question that looms large is why the pre-legislative safeguards to ensure that legislation would be Convention compliant failed to pick up so clear a breach of Convention rights. The presiding officer,[47] law officers,[48] ministers[49] and ultimately, if a little unfashionably, the members of the Scottish Parliament all have a role in ensuring that the Parliament's legislation is competent. Some cover might be found in the convoluted drafting of the section, but it is hard to resist the conclusion that the safeguards operated as an ineffective rubber-stamping exercise, or alternatively people were asleep at the wheel. By any standard this was not the Parliament's finest hour in terms of legality.

The UKSC's reaction to the (technical) incompetence is significant. This is the latest in a series of decisions where the UKSC has explained the different roles of the court and the Parliament, emphasising the respect that courts will accord to the Parliament's proper discretion when legislating. The court's scrutiny of the proportionality of the impugned provision quite properly showed deference to the broad legislative discretion associated with A1P1. However, provisions which are unfair, disproportionate and lacking in logical justification are outwith the parameters of the legislature's discretion. Nevertheless, the remedial response adopted by the court demonstrates sensitivity to a number of factors and adopts an almost co-operative approach: the Parliament's democratic legitimacy and institutional advantages make it the appropriate organ to rectify the problem, and that rectification will be facilitated by the court's order suspending the effect of the decision. In light of the failure of pre-legislative scrutiny this does not necessarily inspire confidence. Such a co-operative approach is made clearer by the UKSC explicitly granting permission to the Lord Advocate to return to the Court of Session to ask for further orders to assist with the process. Granting this permission not only hints at a discursive co-operation generally, it also draws the Scottish government into that discourse – the Lord Advocate is not the parliament's law officer, he is the

46 Paras 57-58.

47 Scotland Act 1998 s 31(2).

48 Section 33(1).

49 Section 31(1). Note that now, though not when the legislation in this case was introduced, any person "in charge of" a Bill must state whether he thinks it is within Parliament's legislative competence.

government's – thus recognising the government's interest as the instigator of the 2003 Act.[50] The UKSC's approach is also sensitive to its supra-jurisdictional role: didactic provision of authoritative answers on the interpretation of the ECHR and then remitting the entirety of the next stage to the Scottish institutions, is consistent with the approach of supra-jurisdictional courts. So section 72(10) is not law – and never has been – but the effects of that finding are postponed to another day.

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Scotland: Twice as Much Criminal Law as England?

Concern has been expressed in recent times over the proliferation of criminal offences.[1] Claims that the UK Government had created over 3,000 offences in a ten year period[2] led to the introduction in England and Wales of a system whereby any civil servant wishing to create a criminal offence needs to obtain "gateway clearance" from the Secretary of State for Justice before doing so.[3] No such mechanism exists in Scotland, where the issue has received rather less attention.[4] Yet the Scottish Parliament has created criminal offences at a far greater rate than its English counterpart. In this note we demonstrate that, over the course of a twelve month period between 2010 to 2011, twice as many criminal offences applying to Scotland were created compared to those applying to England. We analyse this difference and demonstrate that over that period Holyrood showed a far greater propensity to create criminal offences than Westminster, with 165 offences being created by Holyrood for Scotland alone over that period as against a mere 10 created by Westminster for England or England and Wales alone.

50 Cf the approach above, however.

1 See e.g. A Ashworth and L Zedner, "Defending the criminal law: reflections on the changing character of crime, procedure and sanctions" (2008) 2 Criminal Law and Philosophy 21 at 22, 32; C Pantazis, "The problem with criminalisation" (2008) 74 Criminal Justice Matters 10; A Crawford, "Governing through anti-social behaviour: regulatory challenges to criminal justice" (2009) 49 BJ Crim 810 at 826.

2 See N Morris, "Blair's 'frenzied law making': a new offence for every day spent in office", *The Independent,* 16 August 2006. In fact, the true figure is almost certainly much higher than this, with 1395 offences created in the first year of the New Labour government alone. See J Chalmers and F Leverick, "Tracking the creation of criminal offences" [2013] Crim LR 543.

3 Ministry of Justice, *Criminal Offences Gateway Guidance* (2011), available via *www.justice.gov.uk/legislation/criminal-offences-gateway*.

4 Although see P R Ferguson, "Criminal law and criminal justice: an exercise in adhocery", in E E Sutherland et al (eds), *Law Making and the Scottish Parliament: The Early Years* (2011) 208 at 216.